MOTION FILED
MAY 27 1999

No. 98-1848

IN THE
SUPREME COURT OF THE UNITED STATES

COEUR D'ALENE TRIBE,
Petitioner,
v.
STATE OF MISSOURI EX REL.
JEREMIAH (JAY) NIXON,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

MOTION TO GRANT, VACATE AND REMAND

Raymond C. Givens
Counsel of Record
GIVENS, FUNKE & WORK
424 Sherman Avenue
Coeur d'Alene, Idaho 83816-0969
(208) 667-5486

Patricia M. Schwarzschild
Michael R. Shebelskie
William H. Wright, Jr.
HUNTON & WILLIAMS
Riverfront Plaza - East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

Counsel for the Coeur d'Alene Tribe

3 P

Petitioner, Coeur d'Alene Tribe (Tribe), respectfully makes this emergency request as an alternative to the relief requested in its Petition for Writ of Certiorari. This motion is in the nature of an emergency request because without the timely relief sought herein the Tribe's sovereign immunity from suit will be effectively denied in the federal court proceeding below. It is therefore respectfully requested that this motion be considered at the Court's June 24, 1999 conference.

The relief requested herein is 1) to ensure compliance with the jurisdiction analysis very recently articulated in *Ruhrgas AG v. Marathon Oil Co., et al*, 1999 WL 303676 (U.S. Tex.) dated May 17, 1999, and 2) to ensure that the Tribe's sovereign immunity from suit will be respected in the federal court proceeding below. It is requested that the Petition for Certiorari be granted, the decision of the Circuit of Appeals for the Eight Circuit be vacated, and the matter be remanded with instructions that the Circuit further remand the case to the District Court for exercise of the discretion articulated in *Ruhrgas*.

The *Ruhrgas* decision was handed down the same day the Tribe's Petition for Certiorari was received by this Court. *Ruhrgas* held that when a federal district court is considering remand of a case removed from state court, it has discretion to decide straightforward questions of personal jurisdiction before considering more difficult and novel questions of subject matter jurisdiction.

In this case the district court dismissed the Tribe for lack of jurisdiction on the straightforward basis of tribal sovereign immunity. Memorandum and Order entered November 19, 1997. Pet. Writ of Cert. App. 24, 27-29. See also *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751 (1998), (tribal sovereign immunity bars suit regarding off-reservation tribal conduct).

Despite the obvious sovereign immunity of the Tribe after *Kiowa*, the Eighth Circuit reversed. It held that the

district court was required to determine the much more difficult and novel question of subject matter jurisdiction before considering the straightforward jurisdictional question of tribal sovereign immunity.

> On remand, the [district] court must initially determine [the subject matter jurisdiction question of] whether the Tribe's internet lottery is a gaming activity on Indian lands of the Tribe. See 25 U.S.C. §§ 2702(3), 2710(d). If the [district] court concludes the lottery is not conducted on Indian lands when a participant plays from a computer located in Missouri, it must grant the State's motion to remand, and the issue of tribal sovereignty will be decided in the first instance by the state courts.

Missouri v. Coeur d'Alene Tribe, et al., 164 F.2d 1102, 1109 (9th Cir. 1999), Pet. Writ. Of Cert., App. 13a.

The district court, following the Eighth Circuit's mandate, has now set a two day evidentiary hearing on the difficult and novel subject matter jurisdiction questions for July 27 and 28, 1999.

It is this July hearing that creates the emergency nature of this motion. If the district court conducts the July hearing, the Tribe will be forced to participate, despite its obvious immunity from suit after *Kiowa*. Being forced to participate in the July hearing will effectively deny the Tribe its sovereign immunity from suit in the federal court action. This is the reason that the Tribe requests this motion be considered at the June 24, 1999 conference. Under current briefing schedules the Respondents will have filed both their responses to the Petition For Writ Of Certiorari and to this motion by June 16, 1999.

In conclusion, the district court dismissed the Tribe on the straightforward jurisdictional ground of tribal sovereign immunity. The Eighth Circuit reversed, directing that the procedure now rejected by *Ruhrgas* be employed. The district court is proceeding with an evidentiary hearing in July in which the Tribe must participate. The result will be the loss of the Tribe's sovereign immunity in that federal court proceeding.

The Tribe requests that this motion be considered at the June 24th conference, certiorari be granted, the Eighth Circuit decision be vacated and the matter be remanded with instructions that the jurisdictional analysis articulated in *Ruhrgas* be followed so that the district court can first address the Tribe's sovereign immunity from suit.

Respectfully submitted,

Raymond C. Givens
Counsel of Record
GIVENS, FUNKE & WORK
424 Sherman Avenue
Suite 308
P.O. Box 969
Coeur d'Alene, Idaho 83816-0969
(208) 667-5486

Patricia M. Schwarzschild
Michael R. Shebelskie
William R. Shebelskie
HUNTON & WILLIAMS
Riverfront Plaza - East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8200

May 27, 1999 *Counsel for Coeur d'Alene Tribe*